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Supreme Court, U.S.
FILED
DEC 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1818
In the
Supreme Court of the United States
OCTOBER TERM, 1987

ROBERT E. BADHAM, et al.,
Appellants,
v.
MARCH FONG EU, et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

APPELLEE MARCH FONG EU'S BRIEF CONCERNING THE JUDICIAL NOTICE OF CALIFORNIA REGISTRATION DATA

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INTRODUCTION

Appellee March Fong Eu, the Secretary of State of California (the "Secretary of State"), files this brief for the limited purpose of replying to the arguments made in "Appellants' Brief In Opposition to Motion of the Assembly of the State of California to Dismiss or Affirm" ("Appellants' Opposition") concerning reliability of California's voter registration data. The Secretary of State has not to date filed briefs in the present appeal; however as California's chief elections officer, the Secretary of State cannot allow the serious distortions contained in Appellants' Opposition to go unanswered.

In the three-judge district court below, appellees the Assembly of the State of California and the Members of the California Democratic Congressional Delegation (collec-

tively "appellees") requested judicial notice of the Secretary of State's periodic "Report of Registration." These reports are issued two or three times a year by the Secretary of State pursuant to California Elections Code Section 607, which provides in part: "(a) Each county clerk shall send to the Secretary of State a summary statement of the number of voters in the county. The statement shall show the total numbers of voters in the county, the number registered as affiliated with each qualified political party, the number registered in non-qualified parties, and the number who declined to state any party affiliation .... (b) The Secretary of State, on the basis of the statements sent by the county clerks ... shall compile a statewide list showing the number of voters, by party affiliations, in the state ..."[1]

Without presenting any evidence to the court below, appellants opposed appellees' request for judicial notice of the Reports of Registration. Appellants argued: "Plaintiffs do not dispute the authenticity of the California Secretary of State's registration figures contained in the Reports of Registration .... The accuracy of those figures, however, is disputed and, *if requested by the court,* plaintiffs will offer evidence to expose their unreliability." Plaintiffs' Memorandum In Opposition to Request for Judicial Notice at 8 (emphasis added). No such evidence was submitted before the December 5, 1986 hearing on the request for judicial notice. At the hearing, the court did not request any evidence on this issue, nor did appellants submit any. After a brief argument, Judge Schnacke, speaking for the court, ruled "the court will take judicial notice of the election results and of the registration statistics." Transcript of Proceedings, December 5, 1986 at 12:23-24.

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[1]California Elections Code Section 607 was formerly codified as California Elections Code Section 6460.

Registration information in California is subject to a variety of statutory procedures to insure its accuracy. These procedures are fully enforced by the Secretary of State.

ARGUMENT

The data set forth in the Reports of Registration is a completely accurate statement of the number of affidavits of registration on file as of the date indicated on the Report and the number of affidavits of registration indicating affiliation with each political party. Thus, as of the close of registration before the November 1986 general election, it is a fact, not subject to dispute, that there were 12,833,920 affidavits of registration on file in the State of California and that of these affidavits, 6,524,496 indicated affiliation with the Democratic Party, 4,912,581 with the Republican Party, 148,356 with the American Independent Party, 53,267 with the Libertarian Party, 44,257 with the Peace and Freedom Party, 32,835 with other parties, and 1,118,128 without any party affiliation. Report of Registration, October 1986 at 4.

I.

CALIFORNIA ROUTINELY PURGES ITS ROLL OF REGISTERED VOTERS WHO ARE NO LONGER ELIGIBLE TO VOTE

To purge the name of a registered voter from the voter registration rolls is a serious matter. It disenfranchises a person who was formerly permitted to exercise his or her constitutional right to vote. While such purging is not to be done lightly, certain names must be deleted from the voter rolls to keep the registration data current. The California Elections Code provides for such purging procedures, which are enforced by the Secretary of State. *See* California Elections Code Sections 701-831.

For example, California Elections Code Section 704 provides that every month, in every county in California, the local registrar of births and deaths must notify the county clerk of all deaths of persons 18 years of age and over and the county clerk must cancel the registration of each deceased voter. These procedures are carefully enforced. Thus the repeated use of the word "deadwood" in Appellants' Opposition to suggest there are dead voters on the rolls in California is seriously misleading.

In addition to purging deceased voters from the rolls, California employs detailed residency confirmation procedures. Before every direct primary election (*i.e.*, June of even numbered years) the county clerk, with certain exceptions, in every county in California mails a nonforwardable postcard or sample ballot to every registered voter to confirm that the voter is still at the address indicated on the voter rolls.[2] California Elections Code Sections 800 and 800.1. If the postcard or sample ballot is returned by the postmaster (or anyone else) indicating the voter is no longer at the address, the voter is purged from the rolls. California Elections Code Sections 800.3 and 801. All cancellations of voter registration are reported to the Secretary of State and reflected in the Report of Registration. California Elections Code Sections 800.3 and 801(c).

In addition to the pre-primary purge discussed above, California also employs a post-election purge of voter rolls. After a general election (*i.e.*, November of even numbered years) every county clerk in every county in California must mail a nonforwardable postcard "to every person who failed to vote at the general election." California Elections Code Section 802. If the nonvoter has moved within the county,

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[2]If a county opts for the postcard method of checking residency, the county, at its option, may choose not to mail postcards to voters who have voted within the six month period before the mailing.

his or her registration is corrected. *Id.* at Section 803(a). If the nonvoter has moved outside the county, the registration is cancelled and the nonvoter notified. *Id.* at Section 803(b). Finally, if the postcard is undeliverable, the registration is cancelled. *Id.* at Section 803(c).

These mandated and carefully enforced purge procedures remove substantial numbers of voters from the rolls. For example, in November of 1986 there were 12,833,920 registered voters in California. In the next statewide tally of voter registration in March of 1987, there were only 12,121,051 registered voters. The decrease in 712,869 voters, 5.5 percent of November total, reflects the post-election purge.

II.

APPELLANTS' STATEMENT THAT THERE IS EVIDENCE IN THE RECORD BELOW TO SHOW UNRELIABILITY IS INCORRECT

Appellants contend that "[t]here is evidence in the record below in which appellee Secretary of State, the named defendant, questions the validity of California's registration data, because of the significant deadwood on the unpurged registration rolls." Appellants' Opposition at 4. This is not correct. There was no evidence submitted to the court below. Appellants, in their opposition to the request for judicial notice, did offer to file a 1981 letter by the Secretary of State to the Joint Legislative Budget Committee, but the letter was never submitted to the Court, to the best of counsel's knowledge.

III.

THE SECRETARY OF STATE'S REMARKS AT THE DEMOCRATIC COMMITTEE MEETING ARE TAKEN GROSSLY OUT OF CONTEXT

Finally, the Secretary of State is compelled to comment on the excerpts of her remarks before the Democratic State Central Committee in February of 1987 contained in Appellants' Opposition. These remarks (which are not part of the record below), were made at a time when she was campaigning for the United States Senate nomination of her party and were designed to motivate her party's registration efforts. They were not made by the Secretary of State in her capacity as Secretary of State, and the excerpted press release was *not* an official press release of the Secretary of State. In addition, these remarks have been taken totally out of context in Appellants' Opposition. They were not meant to attack the reliability of California's voter registration data, but to spur Democratic registration efforts as the quadrennial presidential election approached.

The professional staff of the Elections Division of the California Secretary of State's Office is highly trained and recognized as being among the best, if not the best, in the nation. They have been appointed as expert witnesses in court proceedings in other states, because of their recognized expertise. They enforce the provisions of the California Elections Code and keep all registration data current and up to date, as required by law.

There is no reason, in the record below or elsewhere, why California registration data should not be the subject of judicial notice.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On December 14, 1988, I served the within Appellee Brief in re: "Robert E. Badham, et al. v. March Fong Eu, et al.," in the United States Supreme Court, October Term 1987, No. 87-1818;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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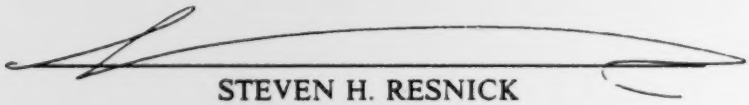
All Parties required to be served have been served.

I certify, under penalty of perjury, that the foregoing is true and correct.

Executed on December 14, 1988, at Los Angeles, California



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